

No. PD-0157-20

**IN THE TEXAS COURT OF CRIMINAL APPEALS
AT AUSTIN, TEXAS**

FILED
COURT OF CRIMINAL APPEALS
2/27/2020
DEANA WILLIAMSON, CLERK

ROBERT ERIC WADE. III, Appellant

v.

THE STATE OF TEXAS

**ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DECISION BY THE THIRD COURT OF APPEALS
IN CAUSE NUMBER 03-18-00712-CR**

REPLY TO STATE'S PETITION FOR DISCRETIONARY REVIEW

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Statement Regarding Oral Argument

Argument is not necessary on a petition for discretionary review which should be refused.

Statement of the Case

Robert Eric Wade, III, was indicted for the offense of aggravated assault by causing serious bodily injury (CR 37). *See* TEX. PEN. CODE § 22.02(a)(1). Wade entered a plea of not guilty to the indicted offense and a plea of not true to the separate deadly weapon allegation notice in the indictment (8 RR 227 – 228). A jury found him guilty of the offense alleged in the indictment and returned a separate verdict finding a deadly weapon was used during the offense (CR 179 – 180 and 10 RR 345). The jury assessed punishment at five years and recommended Wade be placed on community supervision (CR 196 and 11 RR 135). Following the jury's recommendation, the trial court placed Wade on community supervision for a period of seven years and imposed various terms and conditions of community supervision (CR 215 and 12 RR 8). Notice of appeal was timely filed (CR 225).

Statement of Procedural History

On January 16, 2020, the Third Court of Appeals reversed the conviction and remanded for a new trial due to jury charge error for which Wade suffered some harm. *Wade v. State*, ___ S.W.3d ___, 2020 WL 253345 (Tex. App.—Austin 2020, pet. filed). The State did not seek rehearing in the court of appeals. The State timely filed its petition for discretionary review. Wade now files his reply to that petition under TEX. R. APP. P. 68.9.

Reply to Ground for Review One

Wade’s testimony that the complainant did not suffer serious bodily injury was a sufficient basis to entitle him to a jury charge on the lesser offense of assault.

In what is otherwise a rather unremarkable appeal, the State invites this court to make some remarkable changes to the law regarding the standard of review for entitlement to a jury charge on a lesser included offense.¹ Respectfully, the invitation should be declined.

Setting forth the familiar standard of review, the court of appeals noted appellate courts consider all the evidence admitted at trial, not just the evidence

¹ The State fails to cite any reasons for review under TEX. R. APP. P. 66.3 in support of its two grounds for review. The petition should be summarily refused. *See* TEX. R. APP. P. 68.4(h).

presented by the defendant, and if there is more than a scintilla of evidence raising the lesser offense and negating or rebutting an element of the greater offense, the defendant is entitled to a lesser-charge instruction. *Wade*, 2020 WL 253345, at *5. It does not matter whether the evidence is controverted or even credible, nor does it matter whether that evidence is weak or strong, *Id.* If the evidence raises the issue, the trial court must include an instruction in the jury charge. *Id.*

Applying that standard, the court of appeals found Wade’s trial testimony entitled him to the requested jury charge on assault.

Wade's description of the current state of the injury would seem to have provided a basis upon which a jury could infer that the injury was not a severe and permanent disfigurement when it was inflicted. Even assuming that Wade's current description could not necessitate the inclusion of a lesser offense instruction, Wade also testified that Sughrue did not sustain a serious bodily injury in the assault, which provided more than a scintilla of evidence that Sughrue did not suffer a serious permanent disfigurement. *Wade*, 2020 WL 253345, at *6.

On discretionary review, the State argues conclusory lay testimony cannot contradict undisputed testimony from medical sources and a victim on the issue of serious bodily injury such that a lesser included offense is a “valid, rational alternative” to the charged offense (Pet. at 5). The State relies on a series of civil decisions which stand for the proposition that conclusory, baseless opinions, even

when admitted without an objection, are not considered probative sufficient to support a civil judgment (Pet. at 9 – 10).²

Wade responds those decisions are inapplicable for a variety of reasons including: they are civil cases; they have nothing to do with a jury charge; they do not concern lesser included offenses; they involve different standards of proof of preponderance of the evidence as opposed to more than a scintilla of evidence; they concern sufficiency of the evidence challenges: and they turn on an appellate court, rather than a jury judging the credibility of evidence presented at trial. The civil cases do not rescue the State and provide no basis for this court engage in a wholesale revision of the law of lesser included offenses in a court's charge.

Labeling Wade's testimony as "conclusory lay testimony," the State argues such testimony cannot support a charge on assault as a valid, rational alternative to the charged offense of aggravated assault (Pet. at 6 – 8). Wade responds that the argument fails under the current state of the law which the State does not acknowledge in its petition.

² The State relies on: *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009); *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004); *Dallas Ry. & Terminal Co. v. Gossett*, 156 Tex. 252, 294 S.W.2d 377, 380 (1956); and *Casualty Underwriters v. Rhone*, 134 Tex. 50, 132 S.W.2d 97, 99 (1939).

The determination regarding whether injury constitutes serious bodily injury is a question of fact for the jury to decide. *Miller v. State*, 312 S.W.3d 209, 213 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Expert testimony is not required because serious bodily injury may be established without a physician's testimony when the injury and its effects are obvious. *See Carter v. State*, 678 S.W.2d 155, 157 (Tex. App.-Beaumont 1984, no pet.). The person who sustained the injury is qualified to express lay opinion testimony about the seriousness of the injury. *Hart v. State*, 581 S.W.2d 675, 677 (Tex. Crim. App. 1979); *Coshatt v. State*, 744 S.W.2d 633, 636 (Tex. App.-Dallas 1987, pet. ref'd).

Wade insists that if the complainant is qualified to express an opinion as to the seriousness of the injury, Wade is as well. The court of appeals agreed. *Wade*, 2020 WL 253345, at *6.

Viewing the evidence in the light most favorable to the requested charge, there was at least more than a scintilla of evidence from Wade's testimony that the complainant did not sustain serious bodily injury. The record as a whole supports the notion the lesser offense of assault could have been a valid, rational alternative to the charged offense of aggravated assault.

The court of appeals got it right. No reason for this court to exercise its discretionary review jurisdiction is present.

Reply to Ground for Review Two

The court of appeals performed a complete, thorough, and conscientious *Almanza*³ review of the jury charge error.

Having found error, the court of appeals undertook a harm analysis. *Wade*, 2020 WL 253345, at *7 – 8. As mandated by *Almanza*, the court considered the jury charge as a whole, the arguments of counsel, the entirety of the evidence, and other relevant factors present in the record. *Id.* Each factor was found to support a finding of some harm. *Id.* Ultimately, the court found Wade suffered some harm from the jury charge error. *Id.*

In its second ground for review, the State challenges a portion, but not the entirety, of the harm analysis undertaken by the court of appeals (Pet. at 11 – 13).⁴ The State presents the novel argument that a separate deadly weapon finding by the jury of teeth shows the jury harbored no doubt about the seriousness of the complainant's injury. *Id.* Not surprisingly, no authority is cited for the State's argument.

³ *Almanza v. State*, 686 S.W.2d 157 (Tex. Crim. App. 1985).

⁴ Wade argues the State's failure to challenge all four factors found by the court of appeals to weigh in favor of some harm is fatal to this ground.

When considering the jury charge as a whole, the court of appeals specifically addressed the argument presented by the State in the following manner:

In light of the special-issue instructions, the State argues that the jury was free to find that he did not use a deadly weapon during the offense “and thereby inject an inference that they were harboring residual reasonable doubt” but instead chose to make the finding.

However, the special-issue definitions for serious bodily injury and bodily injury were the same as those included in the abstract portion of the jury charge. Moreover, the special-issue definition for “[d]eadly weapon” specified that a deadly weapon is “anything that in the manner of its use is capable of causing death or serious bodily injury,” and the special-issue instruction directed the jury to make a deadly-weapon finding if it found that Wade “used or exhibited a deadly weapon” during the offense. In light of the fact that the same definition for “serious bodily injury” formed the basis for the conviction and for the deadly-weapon finding, we do not agree with the State's argument that the deadly-weapon finding made by the jury in this case shows that there was no harm from the failure to provide the lesser included instruction. In fact, during its closing argument, the State told the jury twice that if it found Wade guilty of the charged offense, the deadly-weapon issue was “necessarily” true. Accordingly, we conclude that the first factor weighs in favor of some harm. *Wade*, 2020 WL 253345, at *7–8.

Wade notes that use of a deadly weapon was not alleged as an element of the indicted offense under § 22.02(a)(2) (CR 37). Thus, it was not an additional theory of conviction which could ameliorate the harm of an erroneous jury charge. The only theory of conviction submitted was causing serious bodily injury under § 22.02(a)(1).

It should be remembered that the indictment alleged Wade caused serious bodily injury while the charge defined a “deadly weapon” as an object capable of causing serious bodily injury (CR 37 and 180). In view of that definition, the jury was not required to find Wade caused serious bodily injury when returning the affirmative finding. The State ignores the real possibility that if the jury had been properly charged, it could have found a misdemeanor assault with bodily injury while still returning an affirmative finding on the unindicted deadly weapon special issue. Such verdicts would not have been inconsistent and would have protected Wade’s right to have the jury properly charged on the applicable law of the indicted offense and any appropriate lesser misdemeanor offense of assault causing bodily injury.

The court of appeals got it right. No reason for this court to exercise its discretionary review jurisdiction is present.

Prayer

Wade prays this court will refuse the State’s petition for discretionary review.

Respectfully submitted,

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Certificate of Compliance

This pleading complies with TEX. R. APP. P. 9.4. According to the word count function of the computer program used to prepare the document, the document contains 1,804 words excluding the items not to be included within the word count limit.

/s/ Richard E. Wetzel
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Certificate of Service

This is to certify a true and correct copy of this pleading was emailed to counsel for the State, Rene Gonzalez at his email address of rene.gonzalez@wilco.org and the State Prosecuting Attorney at her email address of information@spa.texas.gov on this the 26th day of February, 2020.

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